

TITLE 326 AIR POLLUTION CONTROL BOARD

#97-19(APCB)

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from May 1, 1998 through June 1, 1998, on IDEM's draft rule language. IDEM received comments from the following parties:

Squire, Sanders & Dempsey on behalf of: Bethlehem Steel Corporation	(BSC)
Eli Lilly and Company	(ELC)
Baker & Daniels on behalf of: General Electric Company	(GE)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: Information IDEM receives during inspections is different than other information the department typically receives. With inspections the company usually does not receive a copy of the notes that an inspector takes. Furthermore, the company may know generally what areas of the plant an inspector has photographed, but may have little idea of the specific contents of photos or any idea of the images captured in the background.

Information from inspections is also different because a company usually does not have time to perform advance review and planning to identify potential confidentiality issues. Indeed, when an inspector shows up unannounced at a plant, the employees who are knowledgeable about confidentiality issues may not even be present.

For these reasons, it is not appropriate to require claims of confidentiality to be made by a company "at the time" of the inspection, as set forth in proposed 326 IAC 17.1-4-1(b). The proposed rule should be revised to provide that requests for confidentiality of information obtained by IDEM through its own actions, such as inspections, may be submitted within fifteen (15) days of the date the information is obtained and may be general in nature. In addition, the rule should provide that the company will have the opportunity to review the information and make a specific showing as to why it should be treated as confidential before the information is publicly released. Suggested draft rule language was provided. (BSC)

Response: IDEM realizes that due to the nature of inspections, responsible officials may not be present at the time of inspection, nor may there be time to perform advance review of confidentiality issues.

All information obtained by the department is presumed to be public information unless that information is specifically excepted from disclosure at IC 5-14-3-4. All information claimed as confidential is treated as confidential until a final determination is made. It is necessary that the

claim be made at the time of the acquisition of information by the department so that it may be treated as confidential.

It is understandable that it is not practical to claim information at the time of acquisition by the department in the manner specified in the draft rule at 326 IAC 17.1-4-1. Proposed changes allow claims made at time of acquisition of information by the department to be general in nature. The person must submit a more detailed, written claim pursuant to draft rule requirements at 326 IAC 17.1-4-1(d) within five (5) working days of the acquisition of the material by the department.

Furthermore, because responsible officials who are most informed of confidentiality issues may not be present, it may be worthwhile to identify potential confidentiality issues and make them known to appropriate personnel.

Comment: The rule should protect confidential information, regardless of when a person submitting information makes the request. The draft rule essentially invalidates a confidentiality claim made after information is already in IDEM's possession, even if the department has not yet disclosed the information. This places the draft rule at odds with Indiana's Public Records law and environmental laws protecting confidential information. IC 5-14-3-4(a) lists records that agencies simply cannot disclose, IC 5-14-3-4(b) lists additional records that agencies may or may not disclose, at their discretion. Likewise, IC 13-14-11-3(b) affirms the mandate of IC 5-13-3-4(a), and the discretion provided in IC 5-14-3-4(b), within the environmental context. None of those provisions contain a waiver of the exception for failure to satisfy any procedural requirements. (GE)

Response: IDEM agrees with commentor that the rule in question should protect confidential information. As the commentor has indicated, the IDEM has no ability to disclose information as described in IC 5-14-3-4(a) as affirmed in IC 13-14-11-3. However, without a demonstration, for instance, that a "trade secret" has in fact been protected from disclosure, IDEM cannot assume that information should be excepted from disclosure.

Comment: IDEM should provide for claims of confidentiality that are made after the information is in the possession of IDEM. The rule appears to prohibit a claim asserted later, even if IDEM has not yet disclosed the information and would have no problems treating the information confidentially.

IDEM should propose a rule along the lines of the federal rule that allows late claims, but restricts U.S.EPA's obligation to taking steps that are "administratively practicable" to locate the previously submitted information and to associate it with the claim. Suggested draft rule language was provided (ELC)

Response: It is the presumption of the Indiana Public Records law that all information received by IDEM is a public record and available to the public. All information claimed as confidential and therefore excepted from disclosure is treated as confidential until a determination is made. All information received by IDEM that is not claimed as confidential is treated as a public record, accessible to the public and available for inspection. Any information received by the department which is not designated as confidential is considered a public record available to the public even if

the information is not yet available in the proper filerooms. The department cannot guarantee who may have copies or distributed copies of the information. Because of this, it is necessary to claim information as confidential at the time of submittal so that it is not disclosed.

Comment: The rule should simplify the process for submitting confidential materials. The draft rule provides overly prescriptive details for submitting confidential materials. Read literally, the rule could preclude IDEM from treating information as confidential if a person submitting information fails to follow the mandated procedural approach. Further, the draft procedures fail to take into account submission of confidential information by third parties, by fax, or by media other than paper, such as the undeveloped film in an inspector's camera, voice mail, or e-mail. (GE)(ELC)

Response: One goal of this rulemaking is to clearly state what IDEM requires in order to identify claimed information and to make a confidentiality determination. The proposed rule language requires that it be clear that a claim is being made and what information, specifically, is being claimed as confidential. Several amendments have been made to the rule section regarding submission of materials. A number of methods may now be used to assert confidentiality of a document. IDEM, believes that this flexibility will apply to any situation which may arise. However, the claim must be amenable to reduction to document form.

Comment: IDEM should clarify that the methods of identifying confidential information set forth in draft 326 IAC 17.1-4-1(c) are not exclusive. The rule is potentially subject to very rigid interpretation. We think that any method that clearly identifies the information subject to the claim is sufficient. This suggestion is consistent with certain internal IDEM procedures that provide staff with the discretion to correct oversights.

However, under the current and draft rules, such procedures are subject to attack from either side. A person seeking disclosure of a document would maintain that IDEM has no authority under the rule to correct procedural imperfections. A person seeking to protect confidential information from disclosure would maintain that IDEM has no authority to deny a claim because of procedural imperfections.

We suggest that the rule be adjusted to require only that the person asserting a claim of confidentiality clearly identify the information subject to the claim rather than to impose specific procedures. We think that any method that gives IDEM actual notice of which information is subject to the claim is sufficient. Suggested draft rule language was provided. (ELC)

Response: In order for IDEM to recognize a claim of confidentiality thus treating the information as confidential until a determination can be made, it is necessary that it is clear that a claim is being made, that information claimed as confidential is segregated from information not claimed as confidential, and in segregating the information, that it is clear where the information claimed as confidential begins and ends.

Recognizing these criteria, new proposed draft rule language requires that the information claimed as confidential is clearly designated and segregated from other information to the extent that it is clear which information is being submitted as part of the claim. Phrases such as

“confidential” or “trade secrets” are to be used so that a claim can be recognized. This standard should also eliminate the potential conflict created in correcting procedural imperfections of submitted claims of confidentiality.

Comment: IDEM should eliminate the requirement for needless facts that complicate the confidentiality claims process and place undue burdens on persons submitting confidential information. Draft 326 IAC 17.1-4-1(d) provides a long list of factual demonstrations that must accompany each and every claim of confidentiality. Such demonstrations may be needlessly complicated, prescriptive, and burdensome.

While the facts listed might be relevant to the defense of a claim of confidentiality, our experience is that very few claims are ever adjudicated. The confidentiality claims that we now assert in a few sentences will likely become several pages long.

Moreover, the statute already specifies the content of a claim of confidentiality. IC 13-14-11-3 provides that a person submitting a record may certify that, in the person’s opinion, the record is confidential or permissively excepted from the Public Records Law and request that the record be made available for use only by the department. That is all the statute requires for asserting a claim, and the rule should not add to it. Suggested draft rule language was provided. (GE)(ELC)

Response: IDEM has made a number of amendments within this area of the rule in an effort to streamline what was presented in the draft rule. The result of these amendments substantially reduce the burden on the person asserting a confidentiality claim. Looking at the entire confidentiality determination process, it can only be to the advantage of the person requesting confidential treatment of information to demonstrate why that information is entitled to confidential treatment. IC 5-14-3-1 places the burden of proof for the nondisclosure of a public record on the public agency denying access to the public record. In turn, it seems appropriate that the person submitting information to the department provide sufficient justification for confidential treatment to allow the commissioner to make a reasoned decision on confidential treatment, and allow the department to defend a decision to deny access to records deemed confidential.

Comment: The rule should protect confidential information submitted in support of a confidentiality determination. Information submitted in support of the confidentiality claim itself may be confidential. For example, when a claim is based on trade secrecy, the rule essentially mandates that the person set out the independent economic value to competitors of the information that is the subject of the claim. The detailed analysis of how the information subject to the confidentiality claim might be used by the competition would be highly confidential, yet may be subject to little protection under the current rule language. Although 326 IAC 17.1-4-1(e) appears to protect such supporting information until the commissioner makes a determination, it does not appear to provide protection after the determination is made. If the rule continues to require submission of information in support of confidentiality claims, it should contain specific protections for information submitted in support of the confidentiality claim.

Response: IDEM agrees. It is necessary to afford support documentation the same

confidential protection as information submitted as part of the original claim. Proposed draft rule language has been added to ensure protection. It should be noted that support documentation for trade secrecy would typically be information simply demonstrating that submitted information is in fact a trade secret as defined in the rule. Detailed analysis of its economic value to competitors would not be necessary to demonstrate that it meets such criteria.

Comment: IDEM should avoid the conflict created by rule language that paraphrases statutes. IDEM should either delete the details of draft 326 IAC 17.1-5-1 or quote the corresponding statute verbatim. The draft rule establishes certain types of confidential information that may not be disclosed. That language, however, paraphrases the language of IC 5-14-3-4(a), and could create conflict between the rule and the statute.

If IDEM believes it necessary to provide a list of records which are eligible for confidential treatment, the rule can refer the reader to IC 5-14-3.4. If IDEM believes it beneficial for the types of confidential information to be set forth explicitly in the rule, IC 5-14-3-4(a) and (b) should be quoted verbatim. (GE), (ELC)

Response: IDEM agrees, this rule language has been deleted.

Comment: IDEM should delete the detailed provisions for the request of additional information in 326 IAC 17.1-6-2. First, restricting the time-frame to twenty (20) days with the possibility for a twenty (20) day extension needlessly restricts the commissioner's discretion. The commissioner should be able to allow any time period that is reasonable under the circumstances, with a minimum of thirty (30) days.

Second, there is no need for the rule to be so detailed about the method of delivering the requested information. The requirement to confirm deliveries is unnecessary.

Third, because failure to meet the required time-frame for requested additional information leads to automatic loss of confidentiality, it may force unnecessary appeals. Under the draft rule, when the commissioner makes a determination that additional information is required, a notice is sent. If the person receiving the notice does not respond in time, the information will no longer be treated as confidential, without further action by the commissioner.

The rules and the statute are not clear on what to do if an appeal is desired in this circumstance. One plausible position is that the person must appeal the commissioner's original determination, that additional information was required, within fifteen (15) days of the notice. To preserve confidential treatment of information, an appeal must be filed before the response is due. This may force unnecessary appeals. Suggested draft rule language was provided. (ELC), (GE)

Response: A twenty (20) day time frame with the possibility of a twenty (20) day extension allows a total of forty (40) days to submit additional information if needed. A time period greater than this is a disservice to the public as it is the responsibility of government to provide access to information and, oftentimes, such information is pertinent to the public during comment periods for rulemakings or pending operating permits. Additionally, IDEM has amended the provision which automatically would classify a document as a public document to allow the commissioner to make a confidentiality determination on the strength of the information submitted.

While the level of detail provided at draft 326 IAC 17.1-6-2 (now draft 326 IAC 17.1-5-2) may seem excessive, it is important to stipulate the method of delivery to ensure that notice is given, that additional information is needed, to the person who submitted information claimed as confidential.

Comment: IDEM should clarify the draft rule language regarding the return of information. The language, as drafted, states that the department may return information that is not needed, but does not specify to whom that information may be returned. To clarify the draft rule language, we recommend adding the phrase “to the person submitting the confidentiality claim” between the words “return” and “information”. (GE)

Response: The section regarding the return of unneeded information has been deleted.

Comment: IDEM should clarify the draft rule language at 326 IAC 17.1-5-6 regarding the modification of determinations. Subsection (a) of the rule acknowledges that the commissioner has the authority to revise a determination, but subsection (b) contains too little information concerning when and how the commissioner must “inform” the person” who submitted the confidentiality claim.

The rule as drafted triggers the time period for additional information contained in draft 326 IAC 17.1-6-2. Yet, because the rule does not specify how the person will be notified, it is not clear when that period begins to run. Thus, a person could miss the opportunity to furnish additional information before the person is aware of the modified determination. Furthermore, subsection (c) of the rule provides that the commissioner may make any of the listed determinations, but fails to provide any procedures for doing so.(GE)

Response: Proposed draft rule language has been added to clarify that the person who submitted the information will be “informed” by certified mail. This ensures that the person will be notified that a modification of determination is being made and of the opportunity to furnish additional information.

Also, draft rule language has been added to specify that the procedure followed in 326 IAC 17.1-6-6(c) (now draft 326 IAC 17.1-5-5(c)) will be the same as those used in determinations found at 326 IAC 17.1-6-1 (now draft 326 IAC 17.1-5-1).

Comment: IDEM should remove from the draft rule language the provisions for appealing a confidentiality determination. Draft 326 IAC 17.1-6-3, 17.1-6-4, and 17.1-7 address details of the administrative and judicial review of confidentiality determinations. The procedures for appealing commissioner’s decisions are already addressed in the statute and in the rules of the office of environmental adjudication. (ELC), (GE)

Response: The IDEM feels that a brief section in rule including the statutory citation is useful, especially for those less experienced with asserting confidentiality claims, and the possible legal remedies that may be available.

Comment: 326 IAC 17.1-6-1(a) should be revised to clarify that the commissioner is not

required to make a determination in every case. We believe the intent of the requirement is to indicate merely the procedures that the commissioner must follow when making a determination, not to require the commissioner to make a determination in every case. Suggested draft rule language was provided. (ELC)

Response: IDEM has edited the proposed rule language to clarify that the determination shall be made in accordance with the rule.

Comment: A provision should be included in the employee confidentiality agreements specifying that the contract may be enforced by the state or by the owner of the confidential information. Under IC 13-14-11-5 the confidentiality agreements in draft 326 IAC 17.1-10 are enforceable by the state and by the person who submitted the confidential information, but the agreements set out in the rule do not specifically state that. (ELC)

Response: IDEM agrees. Amendments to the confidentiality agreement have been made to reflect the enforcement ability of the state and of the submitter of information for violations of the agreement.

Comment: IC 13-14-11-4 requires IDEM to develop written procedures for the storage and security of records excluded from the disclosure requirements of IC 5-14-3-4, which includes documents subject to this rule. Those procedures must be approved by the environmental boards. This rulemaking provides a logical, convenient time for IDEM to comply with its legal requirement to develop written procedures and seek approval from the air pollution control board. (ELC)

Response: IDEM is working on a procedure manual for the handling of public and confidential records. After receiving proper department approval of the manual, IDEM will publish this manual in the non-rule policy document section in the Indiana Register.